No. 88-1986

Supreme Court, U.S.
FILED
JUL 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

BORDEN, INC.

Petitioner,

v.

AFFILIATED FM INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

MICHAEL A. POPE
(Counsel of Record)
DONALD B. HILLIKER
LINDA J. CHASE
PHELAN, POPE & JOHN, LTD.
180 North Wacker Drive
Suite 500
Chicago, Illinois 60606
312/621-0700
–and–

THOMAS L. LONG
BAKER & HOSTETLER
65 East State Street
Columbus, Ohio 43215
614/228-1541

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a federal court exercising diversity jurisdiction is bound by the decisions of a state intermediate appellate court when determining how a state's highest court would rule on a matter of state law.[1]

[1] Pursuant to Rule 28.1, respondent, Affiliated FM Insurance Company, states that it has two parents: Allendale Mutual Insurance Company and Allendale Associates, Inc. It has no subsidiaries and no affiliate companies.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
1. The Underlying Litigation	1
2. The Affiliated Policy	2
3. Borden's Claims Under the Policy	3
4. The Proceedings Below	3
ARGUMENT OPPOSING CERTIORARI	4
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Bailey v. V & O Press Co., Inc., 770 F.2d 601 (6th Cir. 1985)	7,8
Buckeye Union Insurance Co. v. Liberty Solvents and Chemical Co., Inc., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984)	5, 8
Commissioner of Internal Revenue v. Bosch, 387 U.S. 456, 87 S. Ct. 1776 (1967)	6, 8
Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co., Inc., 842 F.2d 977 (8th Cir. 1988), cert. denied, 109 S. Ct. 66 (1988)	12
Erie v. Tompkins, 304 U.S. 64 (1938)	6, 8, 9
Jackson v. Metropolitan Life Insurance Co., 34 Ohio St. 138, 296 N.E.2d 679 (1973)	7
Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1987)	12
Olmstead v. Lumbermen's Mutual Insurance Co., 22 Ohio St. 2d 212, 259 N.E.2d 123 (1970)	8
Rhoades v. Equitable Life Assurance Society, 54 Ohio St. 2d 45, 374 N.E.2d 643 (1978)	7
Rider v. Cherokee Insurance Co., 635 F. Supp. 699 (E.D. Pa. 1986)	10
West v. American Telephone & Telegraph Co., 311 U.S. 223 (1940)	6, 8
Willoughby Hills v. Cincinnati Insurance Co., 9 Ohio St. 3d 177, 459 N.E.2d 555 (1984)	8, 9
Wilmington Island Construction Co. v. Cincinnati Insurance Co., 179 Ga. App. 477, 347 S.E.2d 308 (1986)	10

Rules	
United States Supreme Court Rule 17	5, 6
Ohio Rules of Civil Procedure, Rule XVI	10, 11

No. 88-1986

IN THE

Supreme Court of The United States

OCTOBER TERM, 1988

BORDEN, INC.

Petitioner,

v.

AFFILIATED FM INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

Respondent Affiliated FM Insurance Company ("Affiliated") respectfully requests the Court to deny Petitioner Borden, Inc.'s ("Borden") request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on January 10, 1989 and the denial of the petition for rehearing entered on March 7, 1989.

STATEMENT OF THE CASE

The Underlying Litigation

In April 1982, Amoco Oil Company ("Amoco") brought suit against Borden in the United States District Court for the Southern District of Texas as a result of Borden's sale to Amoco of real property containing a 35-feet high pile of

radioactive phosphogypsum waste covering some 30 to 40 acres. Radioactive phosphogypsum waste was a by-product of Borden's phosphoric acid manufacturing process. Borden has admitted that it placed the waste on the property during the regular course of its and its predecessor's business operations from the mid-1950's through 1970. Amoco claimed that Borden had fraudulently concealed the radioactive nature of the waste when it sold the property to Amoco in 1977. Amoco sued to rescind the sale, or otherwise to require Borden to bear the cost of removing the waste from the property.

Borden notified Affiliated of the Amoco suit in March 1984 and demanded, pursuant to Affiliated's alleged obligations under an umbrella excess liability insurance policy issued to Borden, that Affiliated indemnify Borden for any amounts it might be held liable to pay Amoco. Borden conducted its own defense of the action. In February 1985, shortly before trial, Borden demanded that Affiliated "participate" in the defense of the action.

The Affiliated Policy

The policy at issue requires Affiliated to indemnify Borden for its losses which arise out of personal injury or property damage caused by an "occurrence."[2] Specifically excluded from coverage under the policy's "pollution exclusion" are losses arising from the discharge of waste materials upon land. However, the exclusion does not bar coverage if the discharge is "sudden and accidental."[3] The policy also bars coverage for injury to premises "alienated" or sold by the

[2] In Affiliated's policy, "occurrence" is defined as "an accident including continuous or repeated exposure to conditions which results in damage neither expected nor intended from the standpoint of the insured."

[3] The "pollution exclusion" provides in relevant part that the policy *shall not apply*:

> to . . . property damage arising out of the discharge, dispersal, release or escape of . . . waste materials. . .upon land . . . , but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Borden's footnote 2 on page 4 of its Petition incorrectly quotes the exclusion as inapplicable if the discharge is either "sudden" *or* "accidental." In fact, the policy requires both elements to be proved in order to avoid the pollution exclusion.

insured when the injury arises out of the premises itself or any part thereof.[4]

The policy further requires Affiliated to defend Borden against any claim made against it, even if fraudulent, so long as the claim is covered by the policy. Thus, if there is no covered "occurrence" or if a specific exclusion bars coverage, there is no duty to defend the claim.

Borden's Claim Under the Policy

Borden claimed that because a count of Amoco's complaint sought recovery under CERCLA[5] for the costs of removing the phosphogypsum from the property, Affiliated's policy should cover any loss to Borden as "property damage." Affiliated disclaimed coverage for the Amoco claim for several reasons, including that both the "pollution exclusion" and the "premises alienated exclusion" barred coverage. Affiliated disclaimed any obligation to defend Borden, among other reasons because the policy did not cover the Amoco claim and, in any event, Borden had not requested Borden to defend the suit.

The Proceedings Below

In April 1985, Affiliated filed suit for declaratory judgment in the District Court of Galveston County, Texas. At about the same time, Borden filed suit for declaratory judgment in the Ohio Court of Common Pleas. Affiliated removed the action to the United States District Court for the Northern District of Ohio on the basis of the parties' diversity of citizenship[6] and voluntarily dismissed the Texas suit.

The parties filed cross-motions for summary judgment seeking a declaration of their respective rights and obligations

---

[4] The "premises alienated exclusion" provides in relevant part that the policy shall not apply to injury or destruction of:

> premises alienated by the named insured, arising out of such . . . premises or any part of such . . . premises.

[5] Comprehensive Environmental Recovery, Compensation and Liability Act of 1980, 42 U.S.C. § 8601 *et seq.*

[6] Borden is a New Jersey corporation with its principal place of business in Columbus, Ohio. Affiliated is a Rhode Island corporation with its principal place of business in Johnston, Rhode Island.

under the policy. The District Court granted Affiliated's motion and denied Borden's, holding that both the pollution and premises alienated exclusions precluded coverage under the Affiliated policy and that, therefore, there was neither a duty to indemnify nor a duty to defend Borden.

In granting Affiliated's motion, the District Court considered two decisions of the Ohio Court of Appeals which held that the pollution exclusion is ambiguous and, therefore, did not apply to preclude coverage. After reviewing related Ohio Supreme Court decisions, case law from other jurisdictions, scholarly works, and dictionary definitions, the District Court was "not persuaded to adopt the approach of" the Ohio Court of Appeals:

> While the opinion of the Ohio Court of Appeals in *Buckeye* is entitled to some deference, it is not absolutely binding on this Court. See *Commissioner v. Estate of Bosch*, 387 U.S. 482, 465 (1967). This Court is convinced that the Ohio Supreme Court would not adopt the construction of the pollution exclusion set forth in *Buckeye*.

Decision and Order, Appendix pp. B-4, 5.

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court without opinion. The Court of Appeals also denied Borden's petition for rehearing.

ARGUMENT OPPOSING CERTIORARI

Rule 17 of the Rules of the Supreme Court of the United States provides that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted *only when there are special and important reasons therefor.*" [Emphasis supplied.] The rule states in relevant part that the Supreme Court may grant review:

> When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, *or has decided a federal question in a way in conflict with applicable decisions of this Court.* [Emphasis supplied.]

Contrary to petitioner Borden's assertion, the Court of Appeals did not decide any question in a way which conflicts with a decision of this Court.

It has long been settled by this Court that federal courts exercising diversity jurisdiction must apply state law "whether the law of the state shall be declared by its Legislature in a statute or by *its highest court* in a decision . . ." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 822 (1938) (emphasis supplied). This Court has also established that "[w]here an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*" *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 61 S. Ct. 179, 183 (1940) (emphasis supplied). Furthermore, this Court has held that:

> [W]hile the decrees of "lower state courts" should be "attributed some weight . . . the decision [is] not controlling . . ." where the highest court of the State has not spoken on the point. [Citations omitted.]

Commissioner of Internal Revenue v. Bosch, 387 U.S. 456, 87 S. Ct. 1776, 1782 (1967).

Consistent with the above long-standing decisions, the Sixth Circuit has ruled:

> If the highest court has not spoken, the federal court must ascertain from *all available data* what the state law is and apply it. The sources of data which may guide our inquiry include the decisional law of the Ohio Supreme Court *in analogous cases and relevant dicta in related cases*. . . . The decisional law of Ohio appellate courts . . . and Ohio trial courts . . . are accorded weight, although a federal court is not bound by lower court determinations *if convinced by other data* that the state's highest court would determine otherwise. . . . In addition, consideration may be given to positions expressed in restatement of law, . . . *law review commentaries*

> . . . *and decisions from other jurisdictions or the "majority" rule.*

Bailey v. V & O Press Co., Inc., 770 F.2d 601 (6th Cir.1985). [Emphasis supplied.]

In this case, the District Court fully considered the two decisions of the Ohio Court of Appeals. However, after surveying the cases on point throughout the country, consulting law reviews, other recent scholarly works, the dictionary definition of the words "sudden" and "accidental," and most importantly, related decisions of the Ohio Supreme Court, the District Court was persuaded "that the Ohio Supreme Court would not adopt the construction of the pollution exclusion set forth in *Buckeye*." Decision and Order, Appendix p. B-5. The district court specifically found:

> The Ohio Supreme Court has stated that:
>
> It is well-settled in Ohio that insurance policies should be enforced in accordance with their terms as are other written contracts. Where the provisions of the policy are clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties. *Rhoades v. Equitable Life Assurance Society*, 54 Ohio St. 2d 45, 374 N.E.2d 643, 644 (1978). See also *Jackson v. Metropolitan Life Insurance Co.*, 34 Ohio St. 2d 138, 296 N.E.2d 679 (1973). Moreover, words in an insurance policy are to be given their commonly accepted meaning unless that would lead to an absurd result. *Olmstead v. Lumbermens Mutual Insurance Co.*, 22 Ohio St. 2d 212, 259 N.E.2d 123 (1970).

Decision and Order, Appendix p. B-5.

Thus, consistent with the decision of the Sixth Circuit in *Bailey* and the decisions of this Court in *Erie, West,* and *Bosch,* the District Court declined to follow two Ohio Court of Appeals decisions in favor of more persuasive authority and the long-standing rules of construction set forth in related opinions of the Ohio Supreme Court. Upon review, the Sixth Circuit found that there had been no error. Ruling, Appendix p. A-2.

In its Petition to this Court, Borden wrongly states that the courts below substituted their own judgment for the judgment

of the Ohio Supreme Court in *Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St. 3d 177, 459 N.E.2d 555 (1984). In *Willoughby*, the court held that an insurance company must defend a suit if the claim is even "potentially or arguably" within the scope of the policy. The court below found that the claims made in the Amoco suit against Borden were plainly excluded from coverage "and, therefore, Affiliated has no contractual obligation to defend or indemnify Borden." Decision and Order, Appendix p. B-6. The court's holding that there was no duty to defend Borden was thus fully consistent with the decision in *Willoughby* because the claims were not "potentially or arguably" within the scope of the Affiliated policy.

There is, therefore, no need here for the Court to review this case for consistency with *Erie*. The District Court followed all relevant Ohio Supreme Court decisions and considered fully all lower court decisions on point. The court decided not to follow the lower court decisions, but only after careful analysis of the issues and review of all the relevant decisional law and scholarly works. That is precisely what this Court anticipated in *Erie* and set forth clearly in later related decisions.

Moreover, even if the Court were to grant review of the decision below and were ultimately to reverse those portions of the decision which were based upon an alleged violation of *Erie*, the outcome of the case would be the same. Borden admits in its Petition that there is an "absence of Ohio authority" construing the premises alienated exclusion, on which the court below also based its decision. Petition p. 6, n. 5. Since there is no Ohio law directly on point which the court below could have followed, it was entirely appropriate for the court to construe the exclusion in accordance with rules of construction set forth in related cases decided by the Ohio Supreme Court. Decision and Order, Appendix p. B-7. This Court should not be asked to devote its resources to deal with issues which will have no effect on the outcome of a case.

Borden further asserts in its Petition that the court below should have followed the "overwhelming non-Ohio authority" allegedly holding that the premises alienated exclusion is inapplicable in similar circumstances. Petition, p. 6, n. 5. Borden's position is untenable for two reasons. First, a federal court sitting in a diversity case is under no obligation to follow decisions from jurisdictions unrelated to the case. Second, the few reported cases construing the premises alienated exclusion support the decision below and hold that the exclusion unambiguously applies to preclude coverage for claims of damage to property which has been sold by the insured to a third party. *Rider v. Cherokee Insurance Co.*, 635 F. Supp. 699 (E.D. Pa. 1986); *Wilmington Island Construction Co. v. Cincinnati Ins. Co.*, 179 Ga. App. 477, 347 S.E. 2d 308 (1986). Those cases cited in Borden's Petition discuss the "owned property exclusion," not the "alienated premises exclusion," and hold only that where contamination on property owned by the insured damages or threatens to damage property owned by a third party, the "owned property exclusion" will not preclude coverage for the cost of cleaning up the contamination. This is quite different from the situation where contaminated property owned by the insured is transferred by sale or otherwise to a third party who then makes a claim against the insured for property damage to that very property. It is this latter situation, the very case presented by Amoco's claim against Borden, that the premises alienated exclusion was designed to cover.

Borden also requests the Court to review the Court of Appeals' failure to utilize "the recently adopted Ohio certification procedure, Rule XVI of the Ohio Rules of Civil Procedure, to request that the Ohio Supreme Court advise it with respect to that state's law." Petition, p. 7.[7] Rule XVI, Section 1 provides:

> The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the

[7] Only the Court of Appeals could have certified any question of law to the Ohio Supreme Court in this case because the Rule permitting the Ohio Supreme Court to answer questions of law certified to it by the federal courts was enacted effective July 15, 1988, months after the District Court had issued its Decision and Order.

> United States, a Court of Appeals of the United States, or a United States District Court. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which may be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of this Supreme Court.

It is clear from the language of the rule that it applies only to permit the Ohio Supreme Court to accept questions certified by a federal court. It does not, and cannot, be applied to require any federal court to certify a question of law to the Ohio Supreme Court. Such certification is purely a discretionary matter.

Moreover, Borden never even requested the Court of Appeals to consider certifying the question to the Ohio Supreme Court until after Borden's appeal had been denied. Now Borden asks this Court to devote its resources to review a discretionary matter which was never an issue below. The Court should not be asked to consider Borden's untimely request.

Finally, although not mentioned among Borden's *Reasons For Granting The Writ*, Borden lists as one of its *Questions Presented:*

> 4. Whether or not the standard pollution and premises alienated exclusions are applicable to this case as a matter of law?

Petition, p. i. However, these state insurance law questions raise the same kinds of state law issues that this Court has declined to review in the past. See, *e.g., Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 842 F.2d 977 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 66; *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703.

In sum, Borden has requested this Court to grant certiorari (1) to review questions of federal law which have long been settled or which have not been raised by the issues in dispute; (2) to review the Court of Appeals' failure to exercise a purely discretionary procedural power; and (3) to resolve insurance questions which are governed by state law. None of these requests is specifically delineated or even contemplated by Supreme Court Rule 17.

CONCLUSION

For all the foregoing reasons, Respondent Affiliated FM Insurance Company requests that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

AFFILIATED FM INSURANCE COMPANY

By:_____

Of Counsel:

MICHAEL A. POPE
(Counsel of Record)
DONALD B. HILLIKER
LINDA J. CHASE
PHELAN, POPE & JOHN, LTD.
180 North Wacker Drive
Suite 500
Chicago, Illinois 60606
312/621-0700

THOMAS L. LONG
BAKER & HOSTETLER
65 East State Street
Columbus, Ohio 43215
614/228-1541